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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BENT DIETRICH,

Petitioner,

—v.—

PATRICIA CHEW, Individually and as Administratrix of the Estate of Daren Chew, deceased and WILLIAM CHEW,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Second Circuit has misread the provisions of the newly revised Rule 4(k) of the Federal Rules of Civil Procedure by combining the separate requirements of 4(k)(1) and 4(k)(2) to find jurisdiction over Petitioner even though neither, standing alone, would have provided such jurisdiction, and, in so doing, has interpreted Rule 4(k) in a manner that conflicts with the provisions of the Rules Enabling Act.

CORPORATE DISCLOSURE STATEMENT

Petitioner Bent Dietrich is an individual German citizen.

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Petitioner, Bent Dietrich, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Chew v. Dietrich*, 143 F.3d 24 (2d Cir. 1998) (*See* App.). The Petition for Rehearing with a Suggestion for a Rehearing In Banc was denied on May 18, 1998 with no opinion. The opinion of the district court for the Southern District in the State of New York in *Chew v. Dietrich*, Civ. No. 10201 is not published, but can be found at 1997 WL 124114 (S.D.N.Y.) (*See* App.).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit ("Court of Appeals") was entered on April 1, 1998. The Court of Appeals denied a timely petition for rehearing on May 18, 1998.

The jurisdiction of this Court is invoked pursuant to Sup. Ct. R. 10(a), where the compelling reason the Court should consider involves a Second Circuit Panel entering a decision in conflict with the First Circuit regarding the same important matter, the law for establishing personal jurisdiction in tort cases under Rhode Island law.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES ORDINANCES, AND REGULATIONS

The following Constitutional Provisions, Treaties, Statutes, Ordinances, and Regulations are reproduced in their full text in the appendix to this petition:

1) U.S. CONST. amend. V

2) U.S. CONST. amend. XIV, § 1

3) 28 U.S.C.A. § 2072

4) FED. R. CIV. P. 4(k)

5) R.I. GEN. LAWS § 9-5-33 (1956)

STATEMENT OF THE CASE

The undisputed facts upon which the Second Circuit based its decision are as follows. In the summer of 1994, Petitioner Bent Dietrich entered his yacht, the S/V RAINBOW, in the Newport-to-Bermuda race. Earlier in that year, the RAINBOW had been in Florida undergoing a repair. After the repair was completed, Dietrich, Robert Sharkey (the vessel's boatsman), and others sailed the boat to Newport, stopping along the way at the Chesapeake Bay for another repair. When the RAINBOW arrived in Newport, additional people were needed to complete the nine-person crew for the race, and Chew joined the vessel there. It is immaterial for purposes of this appeal whether Sharkey actively recruited Chew in Newport or whether Chew learned of the opportunity to sail aboard the RAINBOW through other means, for the District Court found that, as a consequence of plaintiff's pleadings, "no personal jurisdiction over Sharkey exists to be imputed to Dietrich, regardless of whether Sharkey indeed acted as Dietrich's agent or indeed actively solicited Chew." 1997 WL 124114 at *3 n.6. Neither this finding nor any findings of fact were disturbed during appellate review.

As the Second Circuit noted, 143 F.3d at 26, no crew members except Sharkey were paid anything for serving on board, but Dietrich did later pay for hotel rooms and some meals for the crew while they were in Bermuda after the race. In addition, Dietrich paid the airfare back to the United States for at least one of the crew members.

At the time the yacht left Newport, it was Dietrich's intention to bring it back to Newport with some of the same crew members, 143 F.3d at 26, and Sharkey "was supposed to skip-

per the boat on the return trip." 1997 WL 124114 at *1. Instead, Sharkey returned from Bermuda to the United States by air, and Chew, the most experienced sailor aboard, agreed to serve as skipper on the return voyage. *Id.* On or about June 29, 1994, while in international waters, the RAINBOW encountered heavy seas, and Chew was apparently swept overboard. 143 F.3d at 26. His body has never been recovered.

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In December 1995, Chew's parents commenced this action against Dietrich in the United States District Court for the Southern District of New York. This case was within the admiralty and maritime jurisdiction of the District Court pursuant to 28 U.S.C. § 1333. The suit arose out of an alleged maritime tort, namely the death of Appellants' decedent Daren Chew on the high seas. This case also falls within the diversity jurisdiction of the District Court pursuant to 28 U.S.C. § 1332. The individual plaintiffs-appellants are Massachusetts residents, the estate plantiff-appellant is a Rhode Island resident, and defendant-appellee is a citizen of Germany, and more than $50,000 in damages were alleged.

Dietrich moved to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, but agreed that the action could proceed in New York only if he was subject to personal jurisdiction in either New York or Rhode Island. Plaintiffs agreed that Dietrich was not subject to personal jurisdiction in New York but argued that he was subject to personal jurisdiction in Rhode Island.

THE OPINIONS BELOW, THE SECOND CIRCUIT'S ERRORS, AND PETITIONER'S ARGUMENTS

The District Court recognized that the Rhode Island long-arm statute authorizes the exercise of personal jurisdiction to the maximum extent permitted under the Constitution. As the Court of Appeals subsequently explained, "there was no relevant Rhode Island case law on the issue" of whether a Rhode Island state court would have had personal jurisdiction over Dietrich under these precise facts, *see* 143 F.3d at 26, so the District Court focused its opinion "on First Circuit authority, since that is the body of precedent that *would have been applied had plaintiffs brought suit in the District of Rhode Island*." 1997 WL 124114, at *3 n.4 (emphasis added) (citing *Aerogroup Int'l, Inc. v. Marlboro Footworks, Ltd.*, 956 F. Supp. 427, 436 n.14 (S.D.N.Y. 1996)). The District Court then carefully analyzed the First Circuit authorities and concluded that in order to sustain personal jurisdiction in a case such as this involving an alleged tort that occurred outside the forum, the First Circuit generally requires a proximate causal nexus between the defendant's acts within the state and the plaintiff's injury. *Id.* at *3. Finding no such proximate causal connection between Dietrich's activities in Rhode Island and Chew's death on the high seas, the District Court dismissed the action.

The Second Circuit reversed, starting "from a premise different from that of the court below," 143 F.3d at 27, namely, by noting that "[w]hen a complaint asserts federal jurisdiction, Rule 4 of the Federal Rules of Civil Procedure now 'extends the reach of federal courts to impose jurisdiction over the person of all defendants against whom federal law claims are made and who can be constitutionally subjected to the jurisdiction of the courts of the United States.' " *Id.* (citing Purposes of Revision, Advisory Committee Notes, 1993 Amendments to Rule 4). According to the Second Circuit, the effect of the 1993 revision to Rule 4(k) (i.e., the

addition of Rule 4(k)(2)) is that, assuming Dietrich was properly served, "the only question that remains is whether his contacts with *either Rhode Island or the United States* are sufficient to support the exercise of personal jurisdiction." 143 F.3d at 27-28 (emphasis added).

By constructing this flawed syllogism from the separate provisions contained in 4(k)(1) and 4(k)(2), each of which provides an independent basis for personal jurisdiction in federal court, the Second Circuit (erroneously, in Petitioner's view) found in the revised Rule 4(k) justification for applying its own due process standards to the exclusion of First Circuit precedent, noting that "we are at liberty to decide for ourselves what the Due Process Clause requires to sustain personal jurisdiction."[1] While the Second Circuit would undeniably have had the authority to apply its own due process standards had it held that the basis for jurisdiction was the new "federal long-arm statute," Rule 4(k)(2), the Second Circuit did not so hold. Instead, as noted, it constructed a syllogism from the separate provisions of Rule 4(k) to the effect that jurisdiction would be proper if Dietrich's "contacts with either Rhode Island or the United States" were sufficient under due process standards. 143 F.3d at 27-28. The Second Circuit then applied its own due process analysis rather than the First Circuit's to Dietrich's Rhode Island contacts, indeed opining that "Dietrich's contacts with Rhode Island are alone sufficient to sustain the exercise of personal jurisdiction over him under the Due Process Clause." 143 F.3d at 30. Given that Dietrich's contacts with the United States outside of Rhode Island (a repair in Florida and another in the

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[1] 143 F.3d at 30. The cases cited immediately thereafter by the Second Circuit in support of the application of that general principle to these specific circumstances are inapposite, for none deal with the query *required* under Rule 4(k)(1), i.e., whether personal jurisdiction would attach "in a court of general jurisdiction in the state in which the district court is located," which requires the Second Circuit to apply First Circuit law in considering whether Dietrich would have been subject to personal jurisdiction in federal court in Rhode Island.

Chesapeake area before Chew boarded the RAINBOW) were insubstantial and causally unrelated to the alleged tort, the Second Circuit could not have relied on these additional contacts in finding personal jurisdiction, since these contacts would add nothing to the "specific" jurisdiction question, the only relevant analysis.[2] Accordingly, Petitioner reads the Second Circuit's opinion as holding that personal jurisdiction was obtained by means of Rule 4(k)(1) and the Rhode Island long-arm statute, with dicta to the effect that, were that not the case, Rule 4(k)(2) would provide an independent basis for jurisdiction. As will be discussed *infra* at Point II, however, Rule 4(k)(2) could not properly provide a basis for jurisdiction over Dietrich either.

Petitioner respectfully proposes that the Second Circuit has erred in several important aspects of its decision, each one alone deserving of this Court's review. From the perspective that fundamental fairness is the first consideration of jurisprudence, the primary error of the court below was its conclusion that, based on Dietrich's Rhode Island contacts, he "could reasonably [have] anticipate[d] that he might be 'haled into court' in Rhode Island to respond to a suit to recover damages for injuries that crew members recruited in Rhode Island might suffer during the round-trip voyage." 143 F.3d at 30. Indeed, whether one may reasonably expect to be "haled into court" as a result of one's contacts with a forum is, as this Court has held, an essential inquiry in determining whether personal jurisdiction may be obtained over a defendant consistent with the limits of due process. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Since Dietrich could not have been sued in Rhode Island either in state court, *see infra* Point I, or, as the District Court held, 1997 WL 124114 at *3-4, in federal court anywhere in the

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[2] "The parties concede, and the Court agrees, that Dietrich's contacts with Rhode Island are too sporadic to support the exercise of general personal jurisdiction." *Chew v. Dietrich*, 1997 WL 124114 at *2.

First Circuit, the Second Circuit erred in concluding that he could reasonably have anticipated being "haled into court." Notably, the Second Circuit explicitly refrained from reversing the District Court's holding as to what the outcome would have been under First Circuit law, thereby tacitly admitting that it was applying its own due process analysis to the exclusion of the First Circuit's. *See* 143 F.3d at 30.

Although the above may have been the Second Circuit's primary error from the perspective of fundamental fairness, at the crux of its errors from a logical standpoint was its construction of the aforementioned syllogism from the revised Rule 4(k), *see* 143 F.3d at 27-28, from which it apparently determined that it was free to apply its own standards of due process in analyzing Dietrich's Rhode Island contacts alone as a basis for jurisdiction. That crucial error will be discussed *infra* at Point II.

The third error deserving of Supreme Court review lies in the Second Circuit's having written an opinion that apparently relies on the Rhode Island long-arm statute to support personal jurisdiction, but nevertheless applies the Second Circuit's own due process standards (rather than those of the First Circuit) to the analysis. The court's breach in recognition of intercircuit authority raises troublesome questions, some raising new issues of federalism, that illustrate the difficulties that will result if the decision is allowed to stand. For example, could it possibly have been the intent of the Rhode Island legislature, in enacting its long-arm statute, to extend the jurisdictional reach of the statute *beyond* those limits of due process as described by the First Circuit, wherein the state is geographically located? May a federal court sitting elsewhere presume that the legislature *did* intend to draft a statute having such broad reach (as the Second Circuit has done), or should a court instead reasonably construe the statute as extending the reach of jurisdiction only to the limits of due process as interpreted by First Circuit authority? Relatedly, what authority is to be given the Second Circuit's

decision, if it is allowed to stand, in construing the Rhode Island long-arm statute in the future?

It is submitted that by constructing its syllogism derived from the separate and distinct requirements of 4(k)(1) and 4(k)(2), *see* 143 F.3d at 27-28, and by then relying on that flawed syllogism as justification for the application of its own standards of due process in construing the reach of the Rhode Island long-arm statute, the Second Circuit has opened a "Pandora's Box" of troubling questions. In so doing, it would subject Dietrich to personal jurisdiction based solely on his contacts within Rhode Island despite what would have been the reasonable expectation that those contacts, in relation to the tort alleged, were insufficient to have subjected him to the jurisdiction of either the State of Rhode Island or the United States.

Inextricably intertwined with the foregoing three fundamental errors is a fourth: the Second Circuit has construed Rule 4(k) as a whole in a manner that would "abridge [a] substantive right," namely the right to be free from being haled into federal court, in contravention of the Rules Enabling Act, 28 U.S.C. § 2072(b). As one commentator has argued:

> Rule 4(k)(2) and 4(k)(1) do not merely concern service. Rather, Rule 4(k) purports to set forth a test by which assertions of personal jurisdiction are to be adjudged. *Amenability to jurisdiction, however, seems to be a substantive right within the meaning of the Rules Enabling Act* . . . .

Leslie M. Kelleher, *The December 1993 Amendments to the Federal Rules of Civil Procedure: A Critical Analysis*, 12 Touro L. Rev. 7, 55 (1995) (emphasis added).

Although Petitioner does not argue that Rule 4(k) as *drafted* runs afoul of the Rules Enabling Act, the Second Circuit has interpreted the Rule in a manner that *would* conflict with § 2072(b). By combining the separate requirements of 4(k)(1)

and 4(k)(2) to construct its flawed syllogism, *see* 143 F.3d at 27-28, and by then applying its own due process standards to determine whether Dietrich's Rhode Island contacts alone were sufficient, the Second Circuit has held Dietrich subject to personal jurisdiction under Rule 4(k) even though he would not have been subject to jurisdiction under either 4(k)(1) or 4(k)(2). This error is, of course, the corollary to what has been described above as the Court of Appeals' primary error from the standpoint of fundamental fairness, i.e., its conclusion that Dietrich could reasonably have anticipated being "haled into court" as a result of his activities in Rhode Island. It is to that conclusion that Petitioner now turns.

ARGUMENT

I. DIETRICH COULD NOT REASONABLY HAVE ANTICIPATED THAT HIS ACTIVITIES IN RHODE ISLAND WOULD HAVE SUBJECTED HIM TO JURISDICTION IN COURTS OF RHODE ISLAND OR OF THE UNITED STATES FOR AN ALLEGED TORT THAT SUBSEQUENTLY OCCURRED ON THE HIGH SEAS

Although the Second Circuit has "found no Rhode Island case dealing with the precise question presented here," 143 F.3d at 30, the ultimate question of whether Chew's claim could have been brought in state court given an alleged tort that occurred *outside Rhode Island* can readily be answered *in the negative* by reference to existing state case law. In *Messier v. Belisle*, 640 A.2d 959 (R.I. 1994), which arose out of a car accident in Massachusetts, the Supreme Court of Rhode Island held that neither defendant's residence in Rhode Island nor his dealings with the Rhode Island Department of Motor Vehicles constituted sufficient contacts to permit personal jurisdiction over him. In *Roger Williams Gen. Hosp. v. Fall River Trust Co.*, 423 A.2d 1384 (R.I. 1981), a Rhode

Island hospital sought to recover funds allegedly converted (out of state) by a Massachusetts bank. The Court held that it would "offend traditional notions of fair play to exercise jurisdiction over the bank when the alleged claim *did not arise in Rhode Island* and when the bank's main contact with Rhode Island was terminated over 5 months prior to the earliest point in time that a claim could have arisen." 423 A.2d at 1387. Here, the alleged tort occurred on the high seas, well outside Rhode Island's geographical boundaries, and Dietrich's antecedent contacts with the state were already terminated and indeed were far less substantial than those of either the defendant motorist or bank in *Messier* or *Roger Williams*, respectively.

The Second Circuit's opinion contains the observation that "the same result would be reached if Rhode Island law were to be applied," 143 F.3d at 30, but this premise is supported only with general language from Rhode Island cases indicating that the scope of the long-arm statute is coextensive with federal constitutional limits on due process, *id.* (citing *Messier*), and is followed by the admission that the court has "found no Rhode Island case dealing with the precise question presented here." 143 F.3d at 30. But the actual holdings of *Messier* and *Roger Williams* point unerringly to the conclusion that personal jurisdiction would not have attached in state court under these circumstances.

As the Second Circuit tacitly admits, Dietrich would not have been subject to personal jurisdiction in federal court in Rhode Island. Despite its recognition that the First Circuit is "one of the strongest proponents of the proximate cause test," 143 F.3d at 29, the Second Circuit abandoned that test here. The proximate cause test, with one circumscribed exception, *see infra*, has consistently been applied in First Circuit cases. *See, e.g., United Elec. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992); *Pizarro v. Hoteles Concorde Int'l, C.A.*, 907 F.2d 1256, 1259 (1st Cir. 1990). Rather than applying the First Circuit's proximate cause test, which would

have resulted in dismissal, the Second Circuit found jurisdiction over Dietrich despite the absence of any proximate causal connection between his activities in Rhode Island and Chew's subsequent death at sea, opining:

> Where the defendant has had only limited contacts with the state it may be appropriate to say that he will be subject to suit in that state only if the plaintiff's injury was proximately caused by those contacts. *See Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317, 321-22 (2d Cir. 1964). Where the defendant's contacts with the jurisdiction that relate to the cause of action are more substantial, however, it is not unreasonable to say that the defendant is subject to personal jurisdiction even though the acts within the state are not the proximate cause of the plaintiff's injury.

143 F.3d at 29. Although the Second Circuit then cited *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708 (1st Cir. 1996) for the proposition that "strict adherence to a proximate cause standard in all circumstances is unnecessarily restrictive," 143 F.3d at 29 (citing *Nowak*, 94 F.3d at 715), the court went far beyond the narrow *Nowak* exception.

Indeed, in *Nowak*, the First Circuit emphasized the *importance* of adherence to the proximate cause standard in tort cases, stating that a narrow exception to the proximate cause test might be appropriate in the limited context of a relationship between a contractual or business association and a subsequent tort, and holding only that "[w]hen a foreign corporation directly targets residents *in an ongoing effort to further a business relationship* . . . it may not necessarily be unreasonable to subject that corporation to forum jurisdiction when the efforts lead to a tortious result." *Id.* at 715 (emphasis added). This action does not fit into *Nowak*'s narrow exception because it is not alleged, nor is there any evidence, that Dietrich conducted commercial activity or received any economic benefit from his limited and transient contacts with

Rhode Island. Nor was there any "ongoing effort" to further *any* relationship, business or otherwise, with either Rhode Island or the United States. Lastly, the *Nowak* exception was applied in the case of a corporate defendant, a circumstance not present here. The Second Circuit thus extended *Nowak*'s exception to the proximate cause requirement far beyond its limited scope.

As noted, the Second Circuit effectively admitted that its decision was inconsistent with First Circuit precedent when it stated, "We do not have to decide whether the court below was correct in predicting that the First Circuit would adhere to the proximate cause test in this case, since we are at liberty to decide for ourselves what the Due Process Clause requires to sustain personal jurisdiction." 143 F.3d at 30. The Second Circuit thus explicitly chose not to reverse the District Court's determination of the outcome under First Circuit law. Rather, it applied its own due process standards to the exclusion of the First Circuit's.

It must be remembered that the relevant inquiry under Rule 4(k)(1) is whether Dietrich "could be subjected to the jurisdiction of a court of general jurisdiction" in Rhode Island. Fed. R. Civ. P. 4(k)(1)(A). As the District Court recognized, in order to address that inquiry with respect to federal courts sitting in Rhode Island, consideration of First Circuit law *is* required. *See* 1997 WL 124114, at *3 n.4. The Second Circuit thus erred by applying its own standards of due process to that analysis, resulting in its apparent holding that personal jurisdiction exists under Rule 4(k)(1) and the Rhode Island long-arm statute based on Dietrich's activities within that state.

Since, as shown above, neither state nor federal courts sitting in Rhode Island would have exercised jurisdiction over Dietrich in this case, he could not, based on his activities in Rhode Island, have reasonably anticipated being haled into either state or federal court in Rhode Island. Accordingly, the

Second Circuit's conclusion to the opposite effect, 143 F.3d at 30, is erroneous.

II. THE COURT BELOW HAS DERIVED FROM RULE 4(K) A FLAWED SYLLOGISM TO THE EFFECT THAT THE RULE, CONSIDERED AS A WHOLE, PERMITS PERSONAL JURISDICTION TO ATTACH TO A DEFENDANT PROVIDED ONLY THAT THE DEFENDANT HAS BEEN PROPERLY SERVED AND HAS SUFFICIENT MINIMUM CONTACTS IN EITHER THE FORUM STATE OR THE UNITED STATES

The Second Circuit, after noting that its "analysis of the question of personal jurisdiction over Dietrich starts from a premise different from that of the court below," went on to quote the text of both Rule 4(k)(1)(A), which provides for jurisdiction in federal court over a defendant who could be subjected to jurisdiction in a court of general jurisdiction in any state, and of 4(k)(2), which provides that service of a summons is effective to establish jurisdiction over a defendant "who is not subject to the jurisdiction of the courts of general jurisdiction of any state." 143 F.3d at 27 (quoting Fed. R. Civ. P. 4(k)). From these two separate provisions, coupled with the assumption that Dietrich was properly served, the Second Circuit derived the syllogism that the sole remaining inquiry is "whether his contacts with either Rhode Island or the United States are sufficient to support the exercise of personal jurisdiction." 143 F.3d at 28.

Although at first the syllogism appears logical, its flaw lies in its failure to articulate which due process standard should be employed depending on whether 4(k)(1)(A) or 4(k)(2) is the basis for jurisdiction. If jurisdiction is to exist under 4(k)(1)(A), with service under a state long-arm statute, the law of the circuit in which the state is located must be applied, since that law will determine, at least as to federal

courts sitting within the state, whether the defendant "could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located." Fed. R. Civ. P. 4(k)(1)(A). The District Court recognized this, and accordingly applied First Circuit law. 1997 WL 124114, at *3 n.4. *See also Aerogroup Int'l, Inc., supra*, 956 F. Supp. at 436 n.14.

The Second Circuit, however, apparently concluded that the addition of Rule 4(k)(2) to the Federal Rules in 1993 now would permit courts to read Rule 4(k) as a whole, melding the requirements of Rule 4(k)(1) with those of 4(k)(2). That the Second Circuit so concluded is evident from the court's having noted, in leading to the adoption of its flawed syllogism, that "Rule 4 . . . *now* 'extends the reach of federal courts to impose jurisdiction over the person of all defendants against whom federal law claims are made and who can be constitutionally subjected to the jurisdiction of the courts of the United States.' " 143 F.3d at 27 (emphasis added) (quoting from Purposes of Revision, Advisory Committee Notes, 1993 Amendments).

Rule 4(k)(2), however, merely "corrects a gap in the enforcement of federal law" under which a defendant who is a non-resident of the United States but whose contacts with the United States as a whole are sufficient to meet due process standards could escape jurisdiction because the defendant has "insufficient contact with any single state to support jurisdiction under state long-arm legislation or meet the requirements of the Fourteenth Amendment limitation on state court territorial jurisdiction." Fed. R. Civ. P. 4(k)(2) Advisory Committee Notes. *See also World Tanker Carriers v. M/V YA MAWLAYA*, 99 F.3d 717, 720 (5th Cir. 1996); *U.S. S.E.C. v. Carrillo*, 115 F.3d 1540, 1543-44 (11th Cir. 1997).

Thus, Rule 4(k)(2) was drafted to remedy—and, accordingly, contemplates—two possible situations: (1) where the defendant's contacts with the state would be sufficient to sat-

isfy due process but where that state's long-arm statute does not extend its reach to the limits of due process and thus does not authorize service of process; and (2) where the defendant's contacts with the United States as a whole are sufficient to satisfy due process requirements despite the fact that defendant's contacts within any particular state are not. The circumstances present here contrast markedly with both situations. Rhode Island's long-arm statute authorizes jurisdiction to the full reach of due process, making this situation unlike that present in *Omni Capital International v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987) (the case that led to the promulgation of Rule 4(k)(2)), where the limitations inherent in the state long-arm statute prevented the federal court from obtaining jurisdiction despite the adequacy of defendants' contacts within that forum (situation (1)). Nor can these circumstances credibly be described as akin to situation (2), where defendant's contacts with the United States as a whole would satisfy due process requirements while those with any single state would not.

Perhaps overlooking these considerations, the Second Circuit derived from the separate provisions of Rule 4(k)(2) and 4(k)(1) the syllogism that is at the crux of all its other errors, namely that jurisdiction would be proper if Dietrich's "contacts with either Rhode Island or the United States" were sufficient under due process standards. 143 F.3d at 27-28. Since the syllogism as framed dispenses with the requirement that the reviewing court apply the law of the circuit in which the putative forum is located in performing the 4(k)(1) analysis (a necessary requirement if the reviewing court is to determine, as it must, whether jurisdiction would attach there), the Second Circuit's syllogism allowed it to proceed erroneously to an application of Second Circuit due process standards to the only significant contact Dietrich ever had with the United States in relation to the tort alleged, i.e., the RAINBOW's visit to Newport.

III. THE SECOND CIRCUIT HAS RAISED DIFFICULT NEW QUESTIONS OF LAW BY APPLYING ITS OWN DUE PROCESS STANDARDS, TO THE EXCLUSION OF THOSE OF THE FIRST CIRCUIT, TO FIND PERSONAL JURISDICTION OVER PETITIONER UNDER THE RHODE ISLAND LONG-ARM STATUTE

The Second Circuit would have been free to apply its own due process standard had it held that the basis for jurisdiction were Rule 4(k)(2). In fact, it has applied its own due process standard without engaging in the inquiry necessary for a determination of whether Rule 4(k)(2) could be applied. Petitioner accordingly digresses to clarify that essential point.

a. Although an application of the Second Circuit's own due process test would have been appropriate under a 4(k)(2) analysis, the Second Circuit did not find jurisdiction under 4(k)(2).

Rule 4(k)(2) provides that serving a summons is effective to establish personal jurisdiction, with respect to claims arising under federal law, "over the person of any defendant *who is not subject to the courts of general jurisdiction of any state.*" Fed. R. Civ. P. 4(k)(2) (emphasis added). Courts have interpreted the rule as requiring the unavailability of any state long-arm jurisdiction as an absolute prerequisite to the rule's application. *See, e.g., Burke v. Woods*, 1996 WL 223731 (10th Cir. 1996); *Warn v. M/Y MARIDOME*, 961 F. Supp. 1357 (S.D. Cal. 1997); *Aerogroup Int'l, supra*; *see also In re Pintlar Corp.*, 133 F.3d 1141, 1145-46 (9th Cir. 1998). Here, however, the Second Circuit did not make the required determination that Dietrich was not subject to the courts of general jurisdiction of any state (indeed, it opined that the opposite is the case, *see* 143 F.3d at 30), and therefore it could *not* have intended to hold that Rule 4(k)(2) provided jurisdiction.

Further, a moment's reflection reveals that the Second Circuit could *not* have considered 4(k)(2) to be the basis of its finding of personal jurisdiction over Dietrich. This is because, given a state long-arm statute using language designed to make it coextensive with the limits of due process under the United States Constitution (as is Rhode Island's, according to both courts below), Rule 4(k)(2) would apply *only* in cases where, although a defendant does not have minimum contacts within a single state, its aggregate contacts among *several* states either (1) combine to create a "presence" within the United States (for "general" jurisdiction) or (2) *each* contribute to causation (as in a mass tort) (for "specific" jurisdiction). *Cf. Aerogroup Int'l, supra.* But Dietrich's non-Rhode Island contacts were insignificant and added nothing either to his "presence" in the United States or to the occurrence of Chew's death. Consistently with a recognition of the insignificance of those additional contacts, the court below opined that Petitioner's "contacts with Rhode Island are alone sufficient to sustain the exercise of personal jurisdiction over him under the Due Process Clause[,]" 143 F.3d at 30, thereby indicating that the basis for jurisdiction must be 4(k)(1) and the Rhode Island long-arm statute. But, relying on its flawed syllogism that, under Rule 4(k) when viewed as a whole, jurisdiction would attach if Dietrich's contacts with either Rhode Island or the United States are sufficient to support the exercise of personal jurisdiction, 143 F.3d at 27-28, the Second Circuit applied its own due process standards to the exclusion of First Circuit precedent.

b. The Second Circuit has raised difficult new questions of law by applying its own due process standards in analyzing the Rhode Island long-arm statute.

Simply put, the Second Circuit has found jurisdiction under Rule 4(k) even though it has not (and could not) find jurisdiction under either Rule 4(k)(1) or 4(k)(2). It has reached

this erroneous conclusion by means of the syllogism that it has dubbed its "starting premise," creating an amalgam from the two separate provisions and then applying its own due process standards to the exclusion of those of the First Circuit in a 4(k)(1) analysis that relies on service under the Rhode Island long-arm statute. In having done so, it raises troubling new questions of law.

Rhode Island's long-arm statute makes amenable to service of process "every individual not a resident of this state . . . that shall have the necessary minimum contacts with the state of Rhode Island . . . in every case not contrary to the provisions of the constitution or laws of the United States." Gen. Laws of R.I., § 9-5-33(a). It is agreed among both courts below and the Rhode Island Supreme Court, *see Messier, supra*, 640 A.2d at 960, that the statute's scope is coextensive with federal constitutional limits on personal jurisdiction. What is unclear, however, and the question that the unique circumstances of this case have apparently raised for the first time, is whether the statute extends Rhode Island's jurisdiction to the federal constitutional limits as defined by the First Circuit, or whether, as the Second Circuit's decision implies, Rhode Island's legislature has (probably without intending to do so) extended the limits of jurisdiction under the statute beyond the parameters defined by the circuit in which the state sits. If the latter is the case, difficult questions emerge, some examples of which are given at page 7, *supra*.

IV. THE SECOND CIRCUIT HAS CONSTRUED RULE 4(K) IN A MANNER THAT CONFLICTS WITH THE PROVISIONS OF THE RULES ENABLING ACT

As discussed at length in the foregoing arguments, the Second Circuit, relying on the language added to Rule 4(k) in 1993 (i.e., the addition of Rule 4(k)) has constructed a flawed syllogism that has allowed it to find personal jurisdiction over Dietrich even though jurisdiction would not attach under a

separate application of either 4(k)(1) or 4(k)(2), and despite Dietrich's reasonable expectation that he could not be "haled into court" as a result of his activities in Rhode Island.

Notably, doubts about whether Rule 4(k)(2) was within the scope of the Rules Enabling Act have been present from the time of its drafting. The Advisory Committee Notes begin with the following "SPECIAL NOTE":

> Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (k)(2). Should this limited extension of service be disapproved, the Committee nevertheless recommends adoption of the balance of the rule, with subdivision (k)(1) becoming simply subdivision (k). The Committee Notes would be revised to eliminate references to subdivision (k)(2).

Among the specific "constraints" referred to are the provisions of 28 U.S.C. § 2072(b), which requires that rules of practice and procedure promulgated by the Supreme Court pursuant to the Rules Enabling Act (28 U.S.C. § 2072) "shall not abridge, enlarge or modify any substantive right." *Id.*

In analyzing what is meant by a substantive right in the context of challenges that rules of procedure are inconsistent with this provision of the Rules Enabling Act, this Court has stated that the appropriate test is "whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). Subsequently, in *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438 (1946), this Court recognized that "most alterations of the rules of practice and procedure may and often do affect the rights of litigants." It also stated that "Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as neces-

sarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who . . . *have been brought before a court authorized to determine their rights.*" *Id.* at 445-46 (emphasis added). In *Murphree*, the Court sustained the validity of Rule 4(f), which permitted service of process anywhere in the state in which a district court is located, against challenges that it abridged the substantive rights of litigants.

The emphasized language, "who have been brought before a court authorized to determine their rights," is significant, for it leaves open the possibility that whether a litigant may properly be brought before a court in the first place *is* a substantive right. Indeed, as noted at page 8, *supra*, one scholarly commentator has argued that "amenability to jurisdiction . . . seems to be a substantive right within the meaning of the Rules Enabling Act. Kelleher, *supra*, at 55.

Professor Kelleher went on to note that the House Judiciary Committee Report accompanying the 1988 version of the Rules Enabling Act clarified that the purpose of the limiting language was to allocate authority between Congress and the Court. The Report notes:

> [T]he substantive rights protected by proposed section 2072 include rights conferred, or that might be conferred, by rules of substantive law, such as the right not to be injured . . . by another's negligence or the right not to be subject to discrimination in employment on the basis of race. . . . More generally, proposed section 2072 is intended to allocate to Congress, as opposed to the Supreme Court . . . *lawmaking choices that necessarily and obviously require consideration of policies extrinsic to the business of the courts* . . .

Id. (quoting from H.R. Rep. No. 422, 99th Cong., 1st Sess. § 22 (1985) (citations and internal quotation marks omitted)) (emphasis added).

Under this standard, amenability to jurisdiction is a substantive right because it implicates a right conferred by substantive law: the individual's liberty interest as protected by the Due Process Clause of the Fifth or Fourteenth Amendments, and it necessarily does so *before* the individual is subject to the court's jurisdiction. *Cf. Sibbach, supra* (holding that incidental infringements on liberty that are conditioned upon violation of the rules by a litigant already before the court do not offend the Rules Enabling Act). Further, the formulation of a rule governing amenability to jurisdiction involves policy choices that are "extrinsic to the business of the courts," H.R. Rep. No. 422, *supra*, and more appropriately left to Congress.

As noted in the Practice Commentaries, "[t]hat [Rule 4(k)(2)] was accepted and promulgated by the U.S. Supreme Court and then also got through Congress . . . creates a powerful presumption of the rule's proceduralness [as opposed to 'substantiveness'] that should be hard to overcome." David D. Siegel, Supplemental Practice Commentary C4-35, reprinted at p. 87 of 1998 Cumulative Annual Pocket Part to 28 U.S.C.A. Fed. R. Civ. P. Rules 1 to 11. However, a presumption that the rule *as drafted* is "procedural," and therefore not violative of the prohibition against "abridge[ment], enlarge[ment] or modif[ication of] any substantive right" contained in § 2072(b) does not necessarily mean that the rule *as applied* fits within the constraints imposed by the Rules Enabling Act. If Rule 4(k) is applied as the Second Circuit has done here, to find a basis for personal jurisdiction where none would exist in the district and circuit within which the overwhelming majority of Dietrich's few contacts arose (and indeed where none would exist under either Rule 4(k)(1) or Rule 4(k)(2) if each were considered separately), Dietrich's substantive right to be free from being "haled into court" is being rather severely "abridged" and "modified." This is especially so given that Dietrich had no reasonable expectation that his brief and transient contacts with either Rhode

Island or the United States could possibly subject him to jurisdiction.

It is a fundamental principle of statutory interpretation that a statute or rule should be construed in a manner that would make it consistent with the constitution or legislation that enabled its promulgation. Here, Rule 4(k) must not be construed as the Second Circuit has construed it, for to do so would be inconsistent with the mandates of the Rules Enabling Act, 28 U.S.C. § 2072 (b), and it is the duty of this Court to correct that error.

CONCLUSION

For the foregoing reasons, this Honorable Court should review the Second Circuit's decision. If allowed to stand, the opinion would surely foster further misconstruction of the revised Rule 4(k).

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 730, Docket No. 97-7476.

Argued Oct. 20, 1997.
Decided April 1, 1998.

PATRICIA CHEW, Individually and as Administratrix of the Estate of Daren Chew, deceased and WILLIAM CHEW,

Plaintiffs-Appellants,

—v.—

BENT DIETRICH,

Defendant-Appellee.

JOHN A. CIRALDO, Perkins, Thompson, Hinckley & Keddy (David B. McConnell, on the brief), Portland, ME, *for Appellants*.

CARY R. WIENER, Kirlin, Campbell & Keating (Brett M. Popolow, Richard H. Sommer, on the brief), New York City, *for Appellee*.

Before: WINTER, *Chief Judge*, MESKILL, *Circuit Judge*, and MARTIN,* *District Judge*.

MARTIN, *District Judge*:

When Daren Chew agreed to sail in a race from Newport, Rhode Island to Bermuda as a member of the crew on a yacht owned by Bent Dietrich, the Due Process Clause of the United States Constitution was no doubt the furthest thing from their minds. Yet, as a result of Chew's tragic death on the return voyage and his parents' subsequent suit against Dietrich, this Court must explore the limits of the Due Process Clause to determine whether Dietrich, a German citizen residing in Hamburg, Germany, had sufficient contacts with the United States so that its courts may exercise personal jurisdiction over him.

I. FACTS

In the summer of 1994, Dietrich entered his yacht S/V RAINBOW in the Newport to Bermuda race. Earlier in the year, the yacht had been in Florida undergoing repairs under the supervision of Robert Sharkey, whom Dietrich had hired as boatsman. After the repairs were completed, Sharkey, Dietrich, and some of Dietrich's friends sailed the boat up the East Coast, stopping at the Chesapeake Bay for some additional repairs, and then on to Newport for the race.

When the RAINBOW arrived in Newport, additional people were needed to complete the nine person crew for the race. According to Dietrich, Sharkey made it known that they were looking for additional crew members and, as a result, Chew joined them. There is no evidence that anyone but

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* Hon. John S. Martin, Jr. of the United States District Court for the Southern District of New York, sitting by designation.

Sharkey was paid anything for serving on the crew, although Dietrich did pay for hotel rooms and some meals for the crew while they were in Bermuda. In addition, Dietrich paid the airfare back to the United States for at least one of the crew members.

At the time the yacht left Newport, it was Dietrich's intent to bring it back to Newport with some of the same crew members. There is some dispute between the parties concerning Chew's original plans for his return to the United States. In any event, after the boat arrived in Bermuda, Sharkey decided not to make the return trip to Newport, and Dietrich asked Chew to serve as skipper on the return voyage. During that voyage, the boat encountered heavy seas and Chew was swept overboard in international waters. Chew's body was never recovered.

II. PROCEDURAL HISTORY

In December 1995, Chew's parents commenced this action against Dietrich in the Southern District of New York. The record does not indicate how Dietrich, a citizen and resident of Germany, was served—an affidavit of service was never filed. Although the defendant's answer asserted a claim that he was not properly served, that contention was abandoned.

Dietrich moved to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, but agreed that the action could proceed in New York if he was subject to personal jurisdiction in either New York or Rhode Island.[1] Plaintiffs agreed that Dietrich was not subject to personal jurisdiction in New York but argued that he

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[1] Dietrich, in the alternative, moved for dismissal on forum non conveniens ground on the basis that German law was applicable to the action, and for partial summary judgment on the basis that the Jones Act, 46 U.S.C. app. § 688 (1994), did not apply because no employer-employee relationship existed between Dietrich and Chew. Because the District Court granted Dietrich's motion to dismiss for lack of personal jurisdiction, it did not decide either of these issues.

was subject to personal jurisdiction in Rhode Island. Thus, the parties argued to the District Court that the issue was one of Rhode Island law and cited various cases from the Rhode Island District Court and the First Circuit on the question whether Dietrich's contacts with Rhode Island were sufficient to warrant the exercise of personal jurisdiction.

The District Court recognized that Rhode Island's long-arm statute authorizes the exercise of personal jurisdiction to the full extent permitted under the Constitution. Since there was no relevant Rhode Island case law on the issue, the District Court focused its opinion "on First Circuit authority, since that is the body of precedent that would have been applied had plaintiffs brought suit in the District of Rhode Island." *Chew v. Dietrich*, No. 95 Civ. 10201, 1997 WL, 124114, at *3 n. 4 (S.D.N.Y. Mar. 18, 1997) (*citing Aerogroup Int'l, Inc. v. Marlboro Footworks, Ltd.*, 956 F.Supp. 427, 436 n. 14 (S.D.N.Y. 1996)). The District Court then carefully analyzed the First Circuit authorities and concluded that in order to sustain personal jurisdiction, the First Circuit generally requires a proximate causal nexus between the defendant's acts within the state and the plaintiff's injury. *Id.* at *3. The District Court, however, recognized that some federal courts have adopted a broader "but for" standard for determining whether the defendant's acts in the forum state are sufficient to support the exercise of personal jurisdiction and that the First Circuit has adopted a similar standard in cases arising from commercial activities within the state. *Id.* at *3-4. After concluding that the First Circuit would require a proximate causal nexus in a case such as this, the District Court found that the recruiting of Chew to serve on the crew of the RAINBOW was not a proximate cause of his death on the high seas and granted the motion to dismiss. This appeal follows.

III. DISCUSSION

Our analysis of the question of personal jurisdiction over Dietrich starts from a premise different from that of the court

below. The District Court accepted the assertion of the parties that it could exercise personal jurisdiction over Dietrich only if Rhode Island would exercise such jurisdiction. However, plaintiffs assert federal subject matter jurisdiction under the Jones Act, 46 U.S.C. app. § 688 (1994), the Death on the High Seas Act, 46 U.S.C. app. §§ 761-768 (1994), and general federal maritime law. When a complaint asserts federal jurisdiction, Rule 4 of the Federal Rules of Civil Procedure now "extends the reach of federal courts to impose jurisdiction over the person of all defendants against whom federal law claims are made and who can be constitutionally subjected to the jurisdiction of the courts of the United States." Purposes of Revision, Advisory Committee Notes, 1993 Amendments.

Rule 4(k) provides, in relevant part:

> (1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant
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> (A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located, or
>
> . . . .
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> (2) If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

Fed.R.Civ.P. 4(k).

As noted above, the record does not indicate how Dietrich was served with process.[2] Since he abandoned any claim of improper service in the District Court, we must proceed on

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[2] Moreover, the record is silent on how the parties decided to proceed on the assumption that Rhode Island law governed the due process issue raised.

the basis that he was properly served.[3] Consequently, the only question that remains is whether his contacts with either Rhode Island or the United States are sufficient to support the exercise of personal jurisdiction.

Prior to the 1993 amendments of Rule 4, there had been a split of authority on the question whether the issue of personal jurisdiction presented a question of state or federal law, when a federal claim was asserted but service was effected pursuant to the law of the state in which the district court was located. *See generally United Rope Distribs., Inc. v. Seatriumph Marine Corp.*, 930 F.2d 532, 535-36 (7th Cir.1991). The First, Third, Fifth, Ninth, and Eleventh Circuits stated that when assessing the constitutionality of an assertion of personal jurisdiction in a case arising under federal law where service of process had been made using a method authorized by state law, the federal court could exercise personal jurisdiction only if the defendant had sufficient contacts with the forum state to satisfy the Fourteenth Amendment's due process standard. *See, e.g., United Elec., Radio and Mach. Workers of Am. v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1086-87 (1st Cir.1992); *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 295-97 (3d Cir.1985); *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1264-69 (5th Cir.1983); *Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415, 423-427 (5th Cir.1986), *aff'd. sub nom., Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 108 S.Ct. 404, 98 L.Ed.2d 415 (1987); *In re Damodar Bulk Carriers, Ltd.*, 903 F.2d 675. 679 n. 5 (9th Cir.1990); *Cable/Home Communication Corp. v. Network Prod., Inc.*, 902 F.2d 829, 855-56 & n.39 (11th Cir.1990).

> The Sixth and Seventh Circuits expressed the view that in a federal question case, the former Rule 4(e) did not

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[3] Since no question has been raised concerning the method of service of the complaint, there is no need for us to resolve the question of the extent to which federal jurisdiction may be limited in cases where federal claims are asserted but service is effected using the forum state's long-arm statute.

call for the due process analysis based on the Fourteenth Amendment. Rather, the Due Process Clause of the Fifth Amendment controlled and all of the defendant's contacts with the United States could be considered. *See, e.g., Handley v. Indiana & Michigan Elec. Co.*, 732 F.2d 1265, 1268-72 (6th Cir.1984); *United Rope Distribs., Inc. v. Seatriumph Marine Corp.*, 930 F.2d 532, 535-36 (7th Cir.1991); *In re Oil Spill by Amoco Cadiz Off Coast of France on March 16, 1978*, 954 F.2d 1279, 1294 (7th Cir.1992). *See also DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 292 (3d Cir.1981) (Gibbons, J. Dissenting).

Ultimately, the issue was decided by the Supreme Court in *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 108 S.Ct. 404, 98 L.Ed.2d 415 (1987), which adopted the majority view that state law governed the question of personal jurisdiction even in a federal question case.

In response to the Supreme Court's decision in Omni, Rule 4 was amended in 1993, and the language, "under the circumstances," which had been critical to the majority view analysis of Rule 4(e), was eliminated from the rule. *See, e.g.*, 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1075 at 494-95 (2d ed. 1987 & Supp.1997). Subdivision 4(k)(2) was also added to the rule at that time. *See* Advisory Committee Notes, 1993 Amendments, Subdivision (k).

Given the nature of the changes to Rule 4, a strong argument can be made that even where service is made under the forum state's long-arm statute, a federal court may exercise personal jurisdiction as long as such exercise is consistent with the Fifth Amendment due process standard. *But see* 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1067.1 at 97 (Supp.1997). Since this case does not require us to resolve the issue, we will leave that to another day.

Even if we were to assume in this case that the District Court was correct in holding that Rhode Island would not exercise personal jurisdiction over Dietrich, there still is jurisdiction over him pursuant to Rule 4(k), provided that such exercise of jurisdiction satisfies the Fifth Amendment due process standard.

The principles to be applied in determining the due process limits on personal jurisdiction were set forth in a recent decision of this Court:

> The due process clause of the Fourteenth Amendment permits a state to exercise personal jurisdiction over a non-resident defendant with whom it has "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Calder v. Jones*, 465 U.S. 783, 788, 104 S. Ct. 1482, 1486, 79 L.Ed.2d 804 (1984) (*quoting Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 342, 85 L.Ed. 278 (1940) and *International Shoe Co. v. Washington*, 326 U.S.310, 316, 66 S.Ct. 154. 158, 90 L.Ed. 95 (1945)). In determining whether minimum contacts exist, the court considers "the relationship among the defendant, the forum, and the litigation." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984) (*quoting Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569'2579, 53 L.Ed.2d 683 (1977)).
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> . . . .
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> To establish the minimum contacts necessary to justify "specific" jurisdiction, the [plaintiff] first must show that [his] claim arises out of or relates to [defendant's] contacts with [the forum state]. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984). The [plaintiff] must also show that [the defendant] "purposefully availed" [himself] of the privilege of doing business in [the forum state] and that [the defendant] could foresee being "haled

into court" there. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 475,105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985).

> If the [plaintiff] satisf[ies] these requirements, the court also considers whether the assertion of jurisdiction "comports with 'traditional notions of fair play and substantial justice'—that is, whether it is reasonable under the circumstances of a particular case." *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 508, 136 L.Ed.2d 398 (1996) (*quoting International Shoe*, 326 U.S. at 316, 66 S.Ct. at 158), *see also Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 206 (1st Cir.1994).

Chaiken v. VV Pub. Corp., 119 F.3d 1018, 1027 (2d Cir.1997).[4]

While these principles are generally accepted, conflicts have developed in applying them to specific factual situations. In particular, as the District Court noted, there appears

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[4] Although *Chaiken* involved a Fourteenth Amendment analysis, the due process analysis is basically the same under both the Fifth and Fourteenth Amendments. The principal difference is that under the Fifth Amendment the court can consider the defendant's contacts throughout the United States, while under the Fourteenth Amendment only the contacts with the forum state may be considered. *Compare, e.g., Amoco Cadiz*, 954 F.2d at 1294 ("When the national sovereign is applying national law, the relevant contacts are the contacts between the defendant and the sovereign's nation."), *Eskofot A/S v. E.I. Du Pont De Nemours & Co.*, 872 F.Supp. 81, 87 (S.D.N.Y.1995) (stating that defendant must have sufficient contacts with the United States, when personal jurisdiction is exercised pursuant to Rule 4(k)(2)), *SEC v. Carrillo*, 115 F.3d 1540, 1544 (11th Cir.1997), *World Tanker Carriers Corp. v. MV Ya Mawlaya*, 99 F.3d 717, 723 (5th Cir.1996), with, *e.g., Max Daetwyler*, 762 F.2d at 295-97 (limiting relevant contacts to the contacts between the defendant and the forum state in its Fourteenth Amendment due process analysis), *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 623 (4th Cir.1997) (stating that in a Fourteenth Amendment due process analysis, the court is to examine defendant's contacts with the forum state).

to be a split in the Circuits on the standard to be applied in determining if a tort claim "relates" to the defendant's activities within the state. Some Circuits have held that in order for the defendant to be subject to the jurisdiction of a state the conduct within the state must be a proximate cause of the plaintiffs injury. *See, e.g., Pizarro v. Hoteles Concorde Int'l, C.A.*, 907 F.2d 1256,1259 (1st Cir.1990); *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 714-15 (1st Cir.1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1333, 137 L.Ed.2d 493 (1997), *Sybaritic, Inc. v. Interport Int'l, Inc.*, 957 F.2d 522, 524-25 (8th Cir.1992). Others have held that it is sufficient if the defendant's conduct in the state is a "but for" cause of the plaintiffs injury. *See, e.g., Shute v. Carnival Cruise Lines*, 897 F.2d 377, 381-86 (9th Cir.1990), *rev'd on other grounds*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991); *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209,1216 (7th Cir.1984); *Creech v. Roberts*, 908 F.2d 75, 80 (6th Cir.1990).

We do not believe that this dichotomy is as stark as it may at first appear. It must be remembered that the relatedness test is but a part of a general inquiry which is designed to determine whether the exercise of personal jurisdiction in a particular case does or does not offend "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316, 66 S.Ct. at 158 (citation and internal quotation marks omitted). That analysis involves a consideration of "the relationship among the defendant, the forum, and the litigation." *Shaffer*, 433 U.S. at 204 97 S.Ct. at 2579. Where the defendant has had only limited contacts with the state it may be appropriate to say that he will be subject to suit in that state only if the plaintiffs injury was proximately caused by those contacts. *See Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317, 321-22. (2d Cir.1964).[5] Where the defendant's contacts

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[5] While the District Court cites *Gelfand* as a case adopting the proximate cause test, the *Gelfand* opinion makes no reference to such a test and merely indicates that the Court was not willing to uphold personal jurisdiction on the "slender grounds" presented there. *See id.* at 321-22. Moreover, the Court in Gelfand was applying New York law,

with the jurisdiction that relate to the cause of action are more substantial, however, it is not unreasonable to say that the defendant is subject to personal jurisdiction even though the acts within the state are not the proximate cause of the plaintiffs injury.

This type of distinction appears to have been recognized even in the First Circuit which, by its own assessment, is considered to be one of the strongest proponents of the proximate cause test. *See Nowak*, 94 F.3d at 715-16.

In *Nowak*, the First Circuit reiterated its general commitment to the proximate cause test but did not apply it to the facts presented. There, the plaintiffs decedent had drowned in a pool at a hotel operated by the defendant in Hong Kong. Even though the defendant's solicitation of business in Massachusetts was not the proximate cause of the drowning, the First Circuit held that the defendant's activities within the state were sufficient to sustain personal jurisdiction, stating that "we are persuaded that strict adherence to a proximate cause standard in all circumstances is unnecessarily restrictive." *Id.* at 715. The court further noted that "flexibility is necessary in the jurisdictional inquiry: relatedness cannot merely be reduced to one tort concept for all circumstances." *Id.* at 716. The court then stated that "the relatedness requirement . . . authorizes the court to take into account the strength (or weakness) of the plaintiff's relatedness showing in passing upon the fundamental fairness of allowing the suit to proceed." *Id.* (*quoting Ticketmaster*, 26 F.3d at 207 (internal quotation marks omitted; alteration in original)).

We do not have to decide whether the court below was correct in predicting that the First Circuit would adhere to the proximate cause test in this case, since we are at liberty to decide for ourselves what the Due Process Clause requires to sustain personal jurisdiction. *See, e.g., Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir.1993); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1174 (D.C.Cir.1987)

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which limited jurisdiction to "a cause of action arising from" business transacted within the state. *Id.*

(Ruth B. Ginsburg, J.), *aff'd. on other grounds sub nom., Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 109 S.Ct. 1676, 104 L.Ed.2d 113 (1989). *But see Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1127-28 (7th Cir.1993).

In our view, Dietrich's contacts with Rhode Island are alone sufficient to sustain the exercise of personal jurisdiction over him under the Due Process Clause. This case does not arise from a single act of Dietrich in Rhode Island. Dietrich entered Rhode Island intending to assemble a crew for a round-trip voyage to Bermuda. While he may not have recruited Chew personally, the person who did was acting on his behalf. At the time the yacht left Rhode Island for Bermuda, Dietrich intended to return to Rhode Island with many of the same crew members. In these circumstances it "does not offend traditional notions of fair play and substantial justice" to hold that Dietrich may be sued in Rhode Island by the estate of someone who joined the ship in Rhode Island and died during the round-trip voyage. *See International Shoe*, 326 U.S. at 316, 66 S.Ct. at 158 (citation and internal quotation marks omitted). Whether or not Chew or Dietrich intended that Chew would return to Rhode Island on the RAINBOW when they set sail for Bermuda does not add or detract from the fact that Dietrich knew he would be returning with most of the crew. Dietrich could reasonably anticipate that he might be "haled into court" in Rhode Island to respond to a suit to recover damages for injuries that crew members recruited in Rhode Island might suffer during the round-trip voyage. *See World-Wide Volkswagen*, 444 U.S. at 297 100 S.Ct. at 567.

Moreover, as noted above, since the question of personal jurisdiction is one of federal law, we are free to consider all of Dietrich's contacts with the United States in deciding whether the exercise of personal jurisdiction is proper. Since the accident at issue arose from the operation of a yacht that had been maintained and used in the United States exclusively for several months prior to the race, it is not unfair to Dietrich to require him to respond to a suit in the United States that

relates to the operation of the yacht and concerns injuries to a crew member recruited in the United States.

We believe that the same result would be reached if Rhode Island law were to be applied. Rhode Island's long-arm statute provides:

> every individual not a resident of this state . . . that shall have the necessary minimum contacts with the state of Rhode Island, shall be subject to the jurisdiction of the state of Rhode Island . . . in every case not contrary to the provisions of the constitution or laws of the United States.

R.I. Gen. Laws § 9-5-33(a) (1985). The Supreme Court of Rhode Island has held that "the scope of our long-arm statute is coextensive with federal constitutional limits on personal jurisdiction." *Messier v. Belisle*, 640 A.2d 959, 960 (R.I.1994) (citations omitted). *See also McKenney v. Kenyon Piece Dye Works, Inc.*, 582 A.2d 107, 108 (R.I.1990).

Although we have found no Rhode Island case dealing with the precise question presented here, the Supreme Court of Rhode Island has stated:

> [The] inquiry regarding minimum contacts turns on whether the cause of action arises out of the defendant's contacts with the forum. If a defendant's conduct does provide the basis for the litigation, all that need be shown for jurisdiction to be proper is a "relationship among the defendant, the forum, and the litigation."

Id. (*quoting Ben's Marine Sales v. Sleek Craft Boats*, 502 A.2d 808, 812 (R.I.1985) & *Helicopteros*, 466 U.S. at 414, 104 S.Ct. at 1872).

In addition, the decision in Ben's Marine indicates that the Supreme Court of Rhode Island is willing to extend personal jurisdiction as far as the United States Constitution will permit. In that case, the court upheld jurisdiction over a California boat manufacturer in a suit based on a contract for the sale of a boat negotiated in Chicago between the manufacturer

and plaintiffs, Rhode Island residents. The court stated that the manufacturer, who delivered the boat to Rhode Island and accepted payment for the boat there, "should reasonably have expected that it might be 'haled into court' far from its home base in California as a result of such activity." *Ben's Marine*, 502 A.2d at 815 (*quoting World-Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. at 567).

Given Rhode Island's expansive approach to the issue of personal jurisdiction, we do not doubt that the Supreme Court of Rhode Island would find that the substantial relationship between Dietrich's contacts with Rhode Island and Chew's death was more than sufficient to sustain personal jurisdiction over Dietrich in this case.

IV. CONCLUSION

For the foregoing reasons the judgment of the District Court is reversed and the case is remanded.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Dkt No: 97-7476
Filed May 18, 1998

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the fifteenth day of May one thousand nine hundred and ninety-eight.

PATRICIA CHEW, Individually and as Administratix of the Estate of Daren Chew, deceased and WILLIAM CHEW,

Plaintiffs-Appellants,

—v.—

BENT DIETRICH,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellee Bent Dietrich.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular

active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: BETH J. MEADOR
Beth J. Meador,
Administrative Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 95 Civ. 10201 PKL.
Filed March 18, 1997.

PATRICIA CHEW and WILLIAM CHEW, individually; and PATRICIA CHEW as Administratrix of the Estate of Daren Chew, deceased,

Plaintiffs,

—v.—

BENT DIETRICH,

Defendant.

JOHN A. CIRALDO, Perkins, Thompson, Hinckley & Keddy, Portland, ME.

CARY R. WEINER, Kirlin, Campbell & Keating, New York, NY.

MEMORANDUM ORDER

LEISURE, *Judge*.

This maritime action is brought under the Jones Act, the Death on the High Seas Act, and general maritime law. Plain-

tiffs' decedent was lost overboard in international waters while sailing a vessel owned by defendant on the return from a yacht race from Newport, Rhode Island to Bermuda. Plaintiffs bring claims of negligence, wrongful death, and unseaworthiness. Defendant, a German citizen, brings a motion to dismiss for lack of personal jurisdiction, pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. In the alternative, defendant moves for dismissal on forum non conveniens grounds, on the basis that German law must apply to the action; and for partial summary judgment on the basis that the Jones Act does not apply because no employer- employee relationship existed between defendant and plaintiffs' decedent. For the reasons stated below, the motion to dismiss is granted and the motions going to the merits are deemed moot.

BACKGROUND

Defendant Bent Dietrich, a German citizen residing in Hamburg, Germany, owns the S/V Rainbow, a German registered yacht stored and maintained in Florida and used by defendant for recreational racing. During the period from 1992 until the present, defendant has had sporadic contact with the United States. From 1992 until 1993, he was the nominal treasurer of a New York corporation.[1] In 1994, the year of the accident underlying this action, he visited the United States four or five times, for a total of forty-five days, during which he spent his time preparing his yacht for races along the East Coast. In 1995 and 1996, defendant visited Florida, Rhode Island, and Maine on a number of visits for vacation and for the purposes of recreational yacht racing.

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[1] Although this action was brought in this District on the basis of plaintiffs' good faith belief that defendant's contacts with New York were sufficient to support personal jurisdiction in this forum, plaintiffs now concede that defendant is not subject to suit under New York's long-arm statute. *See* Pls.' Mem. Opp. at 3 n. 2. Defendant nevertheless has consented to this venue if the Court determines that he is subject to personal jurisdiction under either New York's or Rhode Island's long-arm statutes.

In June of 1994, defendant entered an amateur race from Newport, Rhode Island to Bermuda.[2] Prior to the race, Dietrich had hired Robert Sharkey in Florida as "boatsman," and Sharkey helped to pilot the boat from Florida to Newport, where the boat was berthed for several days before the race. The Rainbow was shorthanded and required additional crew to enter the race. Plaintiffs' decedent, Daren Chew ("Chew"), a Rhode Island resident, signed on and was listed as a crewmember on the entry form for the Newport-Bermuda race submitted by defendant. The parties differ as to whether Dietrich and/or Sharkey as his agent approached and solicited Chew to join the crew, or whether instead Chew, having heard that the Rainbow needed extra hands, approached Sharkey unilaterally to offer his services.

It is undisputed that defendant furnished certain amenities to those who joined the Rainbow crew, including hotel accommodations in Bermuda that had been arranged some months before the race, and some meal expenses. Dietrich also paid airfare for one crewmember who did not crew the boat on the return trip from Bermuda. Plaintiffs characterize the above arrangements as inducements to employment and consideration for services, while defendant characterizes them as gratuitous. Plaintiffs further allege that Chew was promised $300 as compensation for acting as skipper on the return leg, although defendant in his deposition testimony denies ever discussing any compensation with Chew.

Sharkey skippered the boat to Bermuda, and was supposed to skipper the boat on the return trip. However, Sharkey instead returned to the United States by air, and Chew, as the most experienced sailor on board, took over as skipper for the Bermuda-Newport trip. Chew had previously sailed the Bermuda race on a number of occasions.[3] On or about June

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[2] "[T]he Newport-Bermuda race . . . is an amateur event which bans compensation to crewmembers." Def.'s Statement Pursuant to Local Rule 3(g) ¶ 3; see Pl.'s Statement Pursuant to Local Rule 3(g) (admitting defendant's statement).

[3] The parties differ as to the number of trips Chew had sailed, and as to whether Chew had ever been paid as a sailor on such trips. *Compare*

29, 1994, Chew was lost overboard in international waters during the return to Rhode Island. Chew's parents, in their individual capacities, and his mother, as administratrix of his estate, brought the instant action. Before the Court are defendant's motions (1) for dismissal for lack of personal jurisdiction; (2) for dismissal on grounds of forum non conveniens; and (3) for summary judgment as to the Jones Act claim.

DISCUSSION

A plaintiff facing a Rule 12(b)(2) motion bears the burden of showing that personal jurisdiction over the defendant is properly exercised. In a case in which discovery has not been conducted and no evidentiary hearing as to jurisdictional matters has been held, the plaintiff "need only allege facts constituting a prima facie showing of personal jurisdiction," and the pleadings and affidavits must be construed in the nonmoving party's favor. *PDK Labs. Inc. v. Friedlander*, 103 F.3d 1105, 1108 (2d Cir.1997) (*citing Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir.1990); *CutCo Indus., Inc. v. Naughton*, 806 F.2d 361, 364-65 (2d Cir.1986)); *accord Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560,566-67 (2d Cir.), *cert. denied*, 117 S.Ct. 508 (1996).

The constitutional due process limits on the exercise of personal jurisdiction protect a nonresident defendant's "liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.' " *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (*quoting*

Def.'s Statement Pursuant to Local Rule 3(g) ¶ 9 ("Daren Chew sailed occasionally as a recreational sailor, including twice on other races to Bermuda. On both these trips, however, he was not compensated for his services.") with Pls.' Statement Pursuant to Local Rule 3(g) ¶ 9 ("Daren Chew sailed at least four times in Bermuda races. He was compensated on each of those prior Bermuda trips.") (*citing* William E. Chew Dep. at 7, 8, 10) (citations omitted).

International Shoe v. Washington, 326 U.S. 310, 319, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). Due process concerns about the exercise of personal jurisdiction over a nonresident defendant are satisfied if the defendant has sufficient "minimum contacts" with the forum state and that such exercise of jurisdiction comport with "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316 (*quoting Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)) (internal quotation marks omitted).

Two varieties of personal jurisdiction have been labeled "general jurisdiction" and "specific jurisdiction." *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404 nn. 8-9 (1984). These two varieties differ mainly in the level of "minimum contacts" required to satisfy the concerns stated in *International Shoe*. General jurisdiction requires "continuous and systematic" contacts with the forum state. Id. at 415 (*quoting Perkins v. Benguet Consol. Mining*, 342 U.S. 437, 438, 72 S.Ct. 413, 96 L.Ed. 485 (1952)) (internal quotation marks omitted). The parties concede, and the Court agrees, that Dietrich's contacts with Rhode Island are too sporadic to support the exercise of general personal jurisdiction. Therefore, only specific personal jurisdiction is at issue. In contrast to the "continuous and systematic" contacts required for general jurisdiction, the level of contact necessary to support specific jurisdiction is satisfied "[w]hen a controversy is related to or 'arises out of' a defendant's contacts with the forum." *Id.* at 414 (*quoting Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977)).

The Court of Appeals for the First Circuit has formulated a three-pronged approach to the due process inquiry as it applies to the assertion of specific jurisdiction:[4]

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[4] Because plaintiffs assert the exercise of personal jurisdiction under Rhode Island's long-arm statute, the instant motion in effect requires the Court to determine whether plaintiffs could have invoked the Rhode Island district court's personal jurisdiction over Dietrich had plaintiffs chosen to institute action there rather than in this District. Therefore, "although the constitutional requirements for due process are

> First, the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum-state activities. Second, the defendant's in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable.

United Elec. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1089 (1st Cir.1992). Rhode Island's long-arm statute, the only ground of personal jurisdiction asserted by plaintiffs, authorizes the exercise of personal jurisdiction to the full extent permitted under the Constitution, and thus plaintiffs need not satisfy any separate state law requirements. *See* R.I. Gen. Laws § 9-5-33(a) (1985); *Bendick v. Picillo*, 525 A.2d 1310, 1312 (R.I.1987).

With respect to the first, so-called "relatedness" prong of the test, other circuits's tests also state a similar requirement and there appears to be a split among the circuits as to the degree of relatedness required in cases involving a tort which occurred outside the forum but which is contended to arise from contacts within the forum.[5] *See Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 714-15 (1st Cir.1996). Some circuits have held that a proximate causal link between the in-state contacts and the nonforum tort is required. *See, e.g., Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d

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presumed to be uniformly applied throughout the federal court system," this opinion will focus on First Circuit authority, since that is the body of precedent that would have been applied had plaintiffs brought suit in the District of Rhode Island. *Aerogroup Int'l. Inc. v. Marlboro Footworks. Ltd.*, No. 96 Civ. 2717, 1996 WL 735585, at *7 n. 14 (S.D.N.Y. Dec.24, 1996).

[5] Generally, courts have analogized the relatedness inquiry to the issue of proximate causation in tort law. *See, e.g., Russo v. Sea World*, 709 F.Supp. 39, 42 (D.R.I.1989).

1067,1069 (8th Cir.1983); *Gelfland v. Tanner Motor Tours, Ltd.*, 339 F.2d 317, 321-22 (2d Cir.1964).

Other circuits have suggested that "but for" causation is sufficient. *See, e.g., Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir.1990), *rev'd on other grounds*, 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991); *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 n. 21 (5th Cir.1981). The First Circuit generally requires a proximate causal nexus. *See Nowak*, 94 F.3d at 715 (*citing 163 Pleasant St. Corp.*, 960 F.2d at 1089).

In this case, the controversy revolves around an accident that occurred outside the proposed forum, and therefore the relatedness analysis must focus on whether the accident "directly arise[s] out of, or relate[s] to," Dietrich's contacts with Rhode Island in a manner sufficient to justify the exercise of personal jurisdiction. *Pritzker v. Yari*, 42 F.3d 53, 60 (1st Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1959, 131 L.Ed.2d 851 (1995). Plaintiffs fail to aver facts sufficient to establish a prima facie nexus strong enough to uphold the relatedness prong of the due process inquiry. Even taking as true plaintiff's allegations that Dietrich—through the actions of Sharkey, who was acting, plaintiffs contend, as Dietrich's agent—actively solicited Chew to join the Rainbow's crew, such solicitation is not linked in a proximate causal manner to Chew's later death. But for the alleged solicitation, Chew arguably would never have boarded the Rainbow and hence would not have been lost at sea. However, under the First Circuit's case law, "but for" causation is not generally sufficient to support specific jurisdiction. *Cf. McAleer v. Smith*, 715 F.Supp. 1153, 1157 (D.R.I.1989) (holding that the plaintiffs, parents of sail trainees who drowned in the sinking of defendant's vessel, did not state a legally sufficient nexus by alleging that the defendant's agent's purported misrepresentations with regard to the craft's seaworthiness caused the tortious conduct alleged by plaintiffs).[6]

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[6] The *McAleer* court, however, found that it could exercise personal jurisdiction over the defendant by imputing to him his agent's

Notwithstanding the *Nowak* court's observation that "the proximate cause standard better comports with the relatedness inquiry because it so easily correlates to foreseeability, a significant component of the jurisdictional inquiry," *Nowak*, 94 F.3d at 715, the opinion carves out a narrow exception to the First Circuit's general requirement of proximate causation:

> The concept of proximate cause is critically important in the tort context because it defines the scope of a defendant's liability. In contrast, the first prong of the jurisdictional tripartite test is not as rigid: it is, "relatively speaking, . . . a 'flexible, relaxed standard.' " We see no reason why, in the context of a relationship between a contractual or business association and a subsequent tort, the absence of proximate cause per se should always render the exercise of specific jurisdiction unconstitutional.

Id. (*quoting Sawtelle v. Farrell*, 70 F.3d 1381, 1389 (1st Cir.1995)) (citations omitted). Plaintiffs argue that this exception applies to the instant action. This Court does not agree.

In *Nowak*, the plaintiffs' decedent drowned in the swimming pool of a Hong Kong hotel owned by the foreign defendant, and the plaintiffs brought a wrongful death action invoking the court's personal jurisdiction under the Massachusetts long-arm statute. *See id.* at 711. The plaintiffs' decedent was the wife of an employee of a Massachusetts corporation that does extensive business in Hong Kong. *See id.* The hotel had previously agreed to a corporate discount for the corporation's employees. *See id.* The hotel later directly contacted the corporation. with promotional materials. *See id.* In response to this contact, reservations were made for the

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"continuous and systematic operations in Rhode Island" as a recruiter of sail trainees. *Id.* at 1158. In this case, plaintiffs similarly allege that Sharkey, acting as Dietrich's agent, solicited Chew. However, plaintiffs fail to allege facts sufficient to justify exercise of either general or specific jurisdiction over the purported agent, and therefore no personal jurisdiction over Sharkey exists to be imputed to Dietrich, regardless of whether Sharkey indeed acted as Dietrich's agent or indeed actively solicited Chew.

employee and his wife. *See id.* During that stay at the hotel, the plaintiffs wife drowned. *See id.* In the context of these facts, the court held that "[w]hen a foreign corporation directly targets residents in an ongoing effort to further a business relationship . . . it may not necessarily be unreasonable to subject that corporation to forum jurisdiction when the efforts lead to a tortious result." *Id.* at 715. The court explicitly observed that in so holding, it was "recognizing a narrow exception to the proximate cause test." *Id.* at 716.

Defendant contends that the First Circuit's exception should apply only to corporate defendants and only in cases involving the solicitation of a business relationship. This Court does not go so far as to agree with the first contention, but agrees that both the language and the factual context of the *Nowak* case strongly indicate that the holding narrowly applies to "the context of a relationship between a contractual or business association and a subsequent tort." *Id.* at 715 (emphasis added); *see also id.* at 716 (referring to a defendant's "ongoing effort to further a business relationship") (emphasis added). Plaintiff's case does not readily fit into this exception because it is not alleged that either defendant or his purported agent directed commercial activity at the forum state. Dietrich did not enter a "contractual or business association" in Rhode Island that was followed by a "subsequent tort."[7] Thus, plaintiffs have not established a sufficient nexus to satisfy the relatedness prong of the specific jurisdiction inquiry.

Because it has been determined that defendant's contacts with the forum state were not sufficiently related to the torts alleged in this action, the Court need not reach the other

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[7] Dietrich did sign the entry forms to enter the Rainbow in the Newport-Bermuda race and fax those forms to the forum state, but plaintiffs have not alleged facts to support an inference that such entry represents a "contractual or business association." The race was, by its terms, an amateur event. *See* Def.'s Statement Pursuant to Local Rule 3(g) ¶ 3; Pl.'s Statement Pursuant to Local Rule 3(g) ¶ 3. Furthermore, plaintiffs do not apparently dispute that defendant engaged in yacht racing as a recreational sport and not as a business-related activity.

prongs of the due process analysis in reaching the conclusion that the exercise of personal jurisdiction in this case is inappropriate. Further, because the Court holds that it lacks in personam jurisdiction over Dietrich, the Court need not reach defendant's motions in the alternative for dismissal on forum non conveniens grounds or for summary judgment as to the Jones Act claim.

CONCLUSION

Accordingly, for the reasons stated in the foregoing, defendant's motion to dismiss for lack of personal jurisdiction is HEREBY GRANTED. Defendant's motions in the alternative for dismissal or partial summary judgment are HEREBY DENIED as moot.

SO ORDERED

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. XIV, § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C.A. § 2072

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

FED. R. CIV. P. 4(k)

(k) Territorial Limits of Effective Service.

(1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant

(A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located, or

(B) who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or

(C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335, or

(D) when authorized by a statute of the United States.

(2) If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

R. I. GEN. LAWS § 9-5-33 (1956)

9-5-33 Jurisdiction over foreign corporations and over nonresident individuals, partnerships, or associations.

(a) Every foreign corporation, every individual not a resident of this state or his or her executor or administrator, and every partnership or association, composed of any person or persons not such residents. that shall have the necessary minimum contacts with the state of Rhode Island, shall be subject to the jurisdiction of the state of Rhode Island, and the courts of this state shall hold such foreign corporations and such nonresident individuals or their executors or administrators, and such partnerships or associations amenable to suit in Rhode Island in every case not contrary to the provisions of the constitution or laws of the United States.

(b) Service of process may be made on any such foreign corporation, nonresident individual or his or her executor or administrator, and such partnership or association within or without the state in the manner provided by any applicable procedural rule or in the manner prescribed by order of the court in which the action is brought.

(c) Nothing herein shall limit or affect the right to serve process upon the nonresident individual or his or her executor or administrator, or the partnership or association, or a foreign corporation within this state or without this state in any manner now or hereafter permitted by law.

Supreme Court, U.S.
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No. 98-298

In The

Supreme Court of the United States

October Term, 1997

BENT DIETRICH,

Petitioner,

vs.

PATRICIA CHEW, Individually and as Administratrix of the Estate of Daren Chew, deceased and WILLIAM CHEW,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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THERE IS NO COMPELLING REASON TO GRANT THE WRIT

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Although the list is not exclusive, Rule 10 includes a number of examples which "indicate the character of the reasons the Court considers" compelling. *Id.*

Among the reasons listed is one in which "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. . . ." *Id.* at 10(a). Petitioner Bent Dietrich ("Dietrich") relies on this rationale to invoke the jurisdiction of the Court, saying that

> the compelling reason the Court should consider involves a Second Circuit Panel entering a decision in conflict with the First Circuit regarding the same important matter, the law for establishing personal jurisdiction in tort cases under Rhode Island law."

Petition For Writ of Certiorari at 1 (hereinafter "Petition at __").

Contrary to Dietrich's assertion, as discussed below, the Second Circuit made its finding that Dietrich is subject to personal jurisdiction with specific reference to the law of the First Circuit. Ultimately, its decision was a necessarily factbound determination which is neither in conflict with First Circuit law nor appropriate for review on a writ of certiorari.[1]

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1. The Petition does not explicitly rely in the alternative on any of the other compelling reasons for review listed in Rule 10. In fact, none of those other reasons are implicated by the Second Circuit's decision.

Rule 10 states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. As discussed below, the language of the appellate decision reveals no misstatement of law. Dietrich's bare belief that the Second Circuit reached the wrong conclusion as to his amenability to personal jurisdiction does not justify the review mechanism of certiorari.

THE QUESTION PRESENTED FOR REVIEW REFLECTS PETITIONER'S FUNDAMENTAL MISUNDERSTANDING OF THE COURT OF APPEALS' DECISION

In presenting the question for review by this Court, Dietrich states, *inter alia*, that:

> [T]he Second Circuit has misread the provisions of the newly revised Rule 4(k) of the Federal Rules of Civil Procedure by combining the separate requirements of 4(k)(1) and 4(k)(2) to find jurisdiction over Petitioner even though neither, standing alone, would have provided such jurisdiction. . . .

Petition at i.

Contrary to Dietrich's characterization of the opinion which is the subject of this Petition, the Court of Appeals explicitly stated that it had analyzed 4(k)(1) and 4(k)(2) separately, and that in this case Dietrich is subject to jurisdiction according to the *independent* application of *either* sub-paragraph of Rule 4(k). *See Chew v. Dietrich*, 143 F.3d 24, 30 (2nd Cir. 1998). ("In our view, Dietrich's contacts with Rhode Island are *alone* sufficient to sustain the exercise of personal jurisdiction over him under the Due Process Clause.") (Emphasis supplied).

Although Dietrich may disagree with the conclusion reached by the Court of Appeals, its opinion neither implicitly nor explicitly states that the Second Circuit read 4(k)(1) and 4(k)(2) *together* to find personal jurisdiction.

Read fairly, the Second Circuit's decision does not present the question which was formulated by Dietrich in his petition. Rather, Dietrich is actually calling upon this Court to review a fact-bound decision of the Second Circuit that Dietrich is subject to jurisdiction under *either* Rule 4(k)(1) or 4(k)(2).

Based on his critical misinterpretation that the Second Circuit melded the 4(k) inquiry into a single standard, Dietrich goes on to construct an argument that the Second Circuit disregarded First Circuit and Rhode Island law and construed Rule 4(k) so as to violate the Rules Enabling Act.[2] *See* Petition at 5-9. Because Dietrich's initial assertion is incorrect, however, his conclusions are fatally flawed. In fact, when Dietrich's mistake is corrected, this Court is not faced with any of the errors described in the Petition, nor is any other issue presented which is either consistent with the examples enumerated in Sup. Ct. R. 10 or with this Court's underlying principles of review. The alleged errors are discussed briefly below:

I.

THE COURT OF APPEALS DID NOT DISREGARD FIRST CIRCUIT PRECEDENT IN HOLDING THAT DIETRICH IS SUBJECT TO JURISDICTION PURSUANT TO RULE 4(k)(1).

At several junctures in his petition, Dietrich claims that the Second Circuit ignored First Circuit precedent in applying

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2. Dietrich actually asserts four errors. However, as described in footnote 4, two of the alleged errors are addressed together in Part II.

its own standards of due process to the jurisdictional analysis. For example, Dietrich claims that

> the Second Circuit explicitly refrained from reversing the District Court's holding as to what the outcome would have been under First Circuit law, thereby tacitly admitting that it was applying its own due process analysis to the exclusion of the First Circuit's.

Petition at 7. Dietrich goes on to claim that "the Second Circuit effectively admitted that its decision was inconsistent with First Circuit precedent" as it relates to the question of proximate cause. *Id.* at 12.

In fact, the Second Circuit discussed the relatedness test with specific reference to First Circuit law:

> Where the defendant's contacts with the jurisdiction that relate to the cause of the action are more substantial . . . it is not unreasonable to say that the defendant is subject to personal jurisdiction even though the acts within the state are not the proximate cause of the plaintiff's injury.
>
> This type of distinction appears to have been recognized even in the First Circuit which, by its own assessment, is considered to be one of the strongest proponents of the proximate cause test.

Chew, 143 F.3d at 29 (citing *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 715-16 (1st Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 1333 (1997)). The court went on to discuss the flexibility of the relatedness concept as described by the First Circuit in *Nowak*.

The Second Circuit concluded its discussion of relatedness by saying that given the significance and purposefulness of Dietrich's contacts with Rhode Island, those state contacts were enough to support the constitutional exercise of personal jurisdiction pursuant to the 4(k)(1) analysis.[3] *Chew*, 143 F.3d

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3. Dietrich's Statement of the Case suggests that Daren Chew ("Chew") was an unpaid volunteer who sought out the opportunity to sail on the RAINBOW, then goes on to say that

> [i]t is immaterial for purposes of this appeal whether Sharkey [Dietrich's hired "boatsman"] actively recruited Chew in Newport or whether Chew learned of the opportunity to sail aboard the RAINBOW through other means,

claiming further that "neither this finding nor any [of the District Court's] findings of fact were disturbed during appellate review." Petition at 2. Quite to the contrary, the Second Circuit relied on the fact (among other relevant contacts) that Dietrich recruited Chew in holding that Dietrich was subject to personal jurisdiction:

> Dietrich entered Rhode Island intending to assemble a crew for a round-trip voyage to Bermuda. While he may not have recruited Chew personally, the person who did was acting on his behalf . . . Dietrich could reasonably anticipate that he might be "haled into court" in Rhode Island to respond to a suit to recover damages for injuries that crew members recruited in Rhode Island might suffer during the round-trip voyage.

Chew, 143 F.3d at 30 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). Indeed, the Second Circuit's finding that Dietrich recruited Chew was in keeping with the requirement that the factual allegations relating to jurisdiction must be construed in the plaintiff's favor when, as in this case, no evidentiary hearing had been held as to jurisdictional matters. *PDK Labs., Inc. v. Friedlander*, 103 F.3d 1105, 1108 (2nd Cir. 1997) (citations omitted).

at 30. The Second Circuit's conclusion is consistent with First Circuit law on this point, and the extensive discussion of the First Circuit law of relatedness makes it clear that the Second Circuit's decision is not "in conflict with the decision of another United States court of appeals on the same important matter. . . ." Sup. Ct. R. 10(a).

II.

THE SECOND CIRCUIT DID NOT DISREGARD RHODE ISLAND PRECEDENT IN HOLDING THAT DIETRICH IS SUBJECT TO JURISDICTION PURSUANT TO RULE 4(k)(1).

Dietrich relies on two Rhode Island cases which it claims "point unerringly to the conclusion that personal jurisdiction would not have attached in state court under these circumstances." Petition at 10. However, the determination as to whether jurisdiction may be found in any given circumstance is necessarily factbound and the pair of cases cited by Dietrich are readily factually distinguishable from the instant case.[4] *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485 (1985).

Dietrich makes much of the fact that the torts at issue in *Messier v. Belisle*, 640 A.2d 959 (R.I. 1994) and *Roger Williams Gen. Hosp. v. Fall River Trust Co.*, 423 A.2d 1384 (R.I. 1984) took place outside of Rhode Island. However, the place of the

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4. The issue as to whether the Rhode Island long-arm statute could bring Dietrich within its grasp based on Dietrich's Rhode Island contacts addresses both Dietrich's contention that jurisdiction should not lie based on Rhode Island law, and his claim that the Second Circuit wrongly applied its own Due Process standard without regard to Rhode Island precedent. As described below, even if the Second Circuit had ignored Rhode Island law on this point (which it did not), the result is entirely consistent with Rhode Island law.

tort is not the determinative factor in the jurisdictional inquiry. *See McKenney v. Kenyon Piece Dye Works, Inc.*, 582 A.2d 107 (R.I. 1990) (finding that the single jurisdictional contact of a German manufacturer that sold a machine to a Maine company through a Rhode Island distributor twenty years prior to an accident in Maine which injured a Maine plaintiff was sufficient to support the exercise of jurisdiction in Rhode Island under the state's long-arm statute). The nature and purposefulness of the contacts is the crux of the inquiry, and " 'all that need be shown for jurisdiction to be proper is a relationship among the defendant, the forum and the litigation.' " *Chew*, 143 F.3d at 30 (quoting *McKenney*, 582 A.2d at 108). The Second Circuit found that given "the substantial relationship between Dietrich's contacts with Rhode Island and Chew's death," the Supreme Court of Rhode Island would find the contacts "more than sufficient to sustain personal jurisdiction over Dietrich in this case." *Chew*, 143 F.3d at 31. While it would have been impossible for the Second Circuit to predict with certainty the outcome under Rhode Island law, its decision was well-reasoned and consistent with Rhode Island precedent. Neither of the cases cited by Dietrich leads to the conclusion that the Second Circuit "has decided an important federal question in a way that conflicts with a decision by a state court of last resort. . . ." Sup. Ct. R. 10(a).

III.

THE SECOND CIRCUIT DID NOT CONFLATE THE SEPARATE PROVISIONS OF RULE 4(k)(1) AND 4(k)(2).

Dietrich claims that the Second Circuit has conflated the separate provisions of Rule 4(k) such that its decision violates the Rules Enabling Act. Petition at 8-9. Dietrich appears to reach this conclusion based in large part on his own characterization of his non-Rhode Island contacts as so

"insubstantial and causally unrelated to the alleged tort, [that] the Second Circuit could not have relied on these additional contacts in finding personal jurisdiction" under a separate 4(k)(2) analysis. *Id.* at 6; *id.* at 17.

The Second Circuit did not subscribe to Dietrich's characterization, however, finding those contacts sufficiently purposeful and related to subject Dietrich to jurisdiction by virtue of the independent application of 4(k)(2), even if he were not already subject to 4(k)(1) jurisdiction:

> Since the accident at issue arose from the operation of a yacht that had been maintained and used in the United States exclusively for several months prior to the race, it is not unfair to Dietrich to require him to respond to a suit in the United States that relates to the operation of the yacht and concerns injuries to a crew member recruited in the United States.

Chew, 143 F.3d at 30.

Clearly, the Second Circuit found Dietrich's United States contacts to be significant enough to warrant jurisdiction. Just as clearly, the Court of Appeals stated that this 4(k)(2) finding was made in the alternative, if the Rhode Island contacts under the 4(k)(1) analysis were insufficient to support jurisdiction. *See id.* at 28. The Second Circuit's analysis of 4(k) neither "decided an important federal question in a way that conflicts with relevant decisions of this Court" nor did it "so far depart[ ] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power. . . ." Sup. Ct. R. 10(c); *id.* at (a).

CONCLUSION

For the foregoing reasons, Respondents ask that this Court deny the Petition for Writ of Certiorari submitted by Petitioner Bent Dietrich.

Respectfully submitted,

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